2014 WL 550020 (Idaho) (Appellate Brief)
Supreme Court of Idaho.

Richard J. BRAESE, Jr., Plaintiff/Appellant,
v.
STINKER STORES, INC., Defendant/Respondent.

No. 41296.
January 28, 2014.

(District Court Case No. CV PI 1202147)

Appellant's Reply Brief

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Cases

*1 THIS CASE SHOULD BE ANALYZED UNDER PRINCIPLES OF ORDINARY NEGLIGENCE IMPLICATING THE "GENERAL DUTY OF DUE CARE FOR THE CUSTOMERS OF RETAIL ESTABLISHMENTS"

Respondent persists in invoking irrelevant premises liability cases to support its argument that Appellant asks the Court to adopt a new duty applicable to its negligence in permitting an obviously excited, unrestrained, and out of control dog the freedom to jump upon its **elderly** patron, the Appellant. However, the general duty of due care for the customers of retail establishments is well established. A retailer has a duty to his guests or customers of caring for their safety. *Johnson v. K-Mart Corp.*, 126 Idaho 316, 318, 82 P.2d 971, 973 (Ct App. 1994). "Generally, "owners and occupiers of land will be under a duty of ordinary

care under the circumstances towards invitees who come upon their premises." *Harrison v. Taylor,* 115 Idaho 588, 596, 768 P.2d 1321, 1329 (1989), *McDevitt v. Sportsman's Warehouse, Inc.*, 151 Idaho 280,284,255 P.3d 1166,1170 (2011). In holding that the Idaho's Legislature abolished the open and obvious danger doctrine when it passed Idaho's comparative negligence statute (I.C. § 6-801), it noted:
Under an ordinary negligence standard of care, the owner or occupier of premises is not held strictly liable for injuries to invitees who enter upon the property:

The duty not to be negligent is only a duty to take *reasonable* precautions against risk of undue harm. Even if the possessor were to come under the ordinary rule of negligence, therefore, he could always repel the obligation to take any precaution he could show to be unreasonable and burdensome.

Shindurling, "The Law of Premises Liability-is a Reasonable of Care Unreasonable?" 13 Idaho L.Rev. 67 (1976) (citing 2 Harper The Law of Torts at 1437 (1956)) (emphasis in original). ***2** By removing the open and obvious danger bar we implement further the legislative mandate compelled by I.C. § 6-801: "Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence ..." (emphasis added). Issues involving the parties' negligence, if any, will normally be considered and decided by the jury, which is as it should be:

We must either trust the jury or get rid of it. One cannot afford to sympathize for long with the view that a legal system must carry the burden of fictitious and obscurantist doctrine in order to keep vital issues away from that tribunal which was constituted to decide them.

Hughes, "Duties to Trespassers: A Comparative Survey and Revaluation," 68 Yale L.J. at 700 (1959).

Harrison v. Taylor, 115 Idaho 588, 596, 768 P.2d 1321, 1329 (1989).

Harrison and its progeny teach that ordinary negligence defines the standard of duty in the ordinary case. Harrison's citation to Shindurling's article is particularly helpful in this case, because it is doubtful that Respondent could establish that the precaution of keeping dogs out of its stores would have been "unreasonable and burdensome" in light of the fact that the dog was not permitted in the store given the requirements of the Idaho Food Code, [1] which if followed would have precluded allowing the dog into the store:

Prohibiting Animals. (Pertinent parts)
(A) Except as specified in ¶¶ (B) and (C) of this section, live animals may not be allowed on the PREMISES of a FOOD ESTABLISHMENT.

(B) Live animals may be allowed in the following situations if the contamination of food; clean EQUIPMENT, UTENSILS, and LINENS; and SINGLEUSE ARTICLES cannot result:

(2) Patrol dogs accompanying police or security officers in offices and dining, sales, and storage areas, and sentry dogs running loose in outside fenced areas;

***3** (3) In areas that are not used for FOOD preparation and that are usually open for customers, such as dining and sales areas, SERVICE ANIMALS that are controlled by the disabled EMPLOYEE or PERSON, if a health or safety HAZARD will not result from the presence or activities of the SERVICE ANIMAL;...

See, *Appendix*, Idaho Food Code (compilation of IDAPA 16.02.19), definition of "Food Establishment" in Section 1-201.10(B)(36) and "Prohibiting Animals" Section 6-501.115, IDAPA adopted pursuant to IDAPA 16.02.19.000 and, Idaho Code $39-1603

The regulation distinguishes between 1) areas in which contamination can result (in which no live animals are allowed), 2) areas in which food is not prepared but in which a health or safety hazard may result (in which no live animals are allowed), and 3) areas in which food is not prepared and in which a health or safety hazard will not result (in which only "service animals" are allowed).

Indeed, Respondent claims that they were already voluntarily protecting customers from unruly dogs:
Q Appreciate the clarification. Now, one of the things that you said with respect to your own employees, the dogs had to be on a leash and they couldn't be unruly and that was to protect the customers; is that correct?

A Protect everything, yeah, protect everything, the employees, customers and merchandise, stuff in the store, yeah.

Wilson Depo. Pg. 37 Ln. 1-8, Cr. 000146.

Further, even if Respondent's argument that foreseeability is negated by an absense of prior injuries caused by unruly dogs were not self-refuting, it is belied by recent authority from this Court. In *Rountree v. Boise Baseball, LLC,* 154 Idaho 167, 296 P.3d 373, (2013) the Respondent argued that it needed a special duty rule because of the absence of prior injury:
Boise Baseball admits that at least for "seven seasons [, Mr. Rountree's] accident is the only time a spectator has suffered a 'major' injury because of a foul ball" at Memorial ***4** Stadium. The rarity of these incidents weighs against crafting a special rule. There is no history of accidents that we can look to, and draw from, to sensibly create a rule.

Rountree v. Boise Baseball, LLC, 154 Idaho 167, 173, 296 P.3d 373, 379 (2013).

Retail establishments are liable for boxes that fall on patrons, floors that are too slick or wet, etc. There is nothing new about the duty to prevent foreseeable injury. Respondent argues that it was essentially good for business to allow dogs in its establishment at Hyde Park, even though other Stinker Stores had not allowed it, because it was near a park, "everybody did it," and if Respondent had prohibited it they would have been the real mean people." *Wilson Depo.* Pg. 36 Ln. 9-16, Cr. 000146. Based upon Respondent's manager's testimony it is clear that it foresaw the risk of unruly dogs, and that it voluntarily took action to prevent resulting injury, even if it adopted lax measures to attract business.

IT IS UNDISPUTED THAT THE POSSIBILITY OF INJURY CAUSED BY UNRULY DOGS WAS FORESEEN

Respondent argues that notwithstanding the fact that it foresaw the need to implement rules for its employees regarding keeping unruly dogs not under the control of a leash out of its premises, "It was not reasonably foreseeable that the dog in this case would cause injury to plaintiff." It is undisputed that Respondent's Manager understood the dogs posed a risk of injuring people. [2] Respondent's arguments for upholding summary judgment rely on a series entangled logical fallacies. Respondent's Manager Suzie Wilson testified that Stinker Store had voluntarily adopted rules regarding dogs, consistent with her admission that there that there is always a risk that a dog can startle someone by barking or anything like that. [3] Specifically, it is undisputed ***5** that Respondent's manager Susie Wilson had advised its employees during the twelve years in which she was manager prior to August 6th, 2011 to "Make [the customers] take their dogs outside if they're uncontrollable, and especially if they're not on a leash." [4] Clearly, Respondant foresaw the dangers of unruly dogs, yet it argues that when its employee failed to follow its safety rule, Appellant's resulting injuries were unforeseeable. The fallacy in this argument is so transparent that its refutation requires no further elaboration.

Respondent's second argument is similarly fallacious. In essence, Respondent argues that the apparent efficacy of its safety measures proves that they were unnecessary in this case. Respondent argues that because millions of people frequent

Respondent's stores each year, but only two known incidents involving dogs have occurred, injuries by dogs are unfoerseeable. The fact that the Respondents precautions allegedly had previously proved effective in preventing injuries such as those suffered by the Appellant is not evidence adopted rules was unnecessary in this case, or that Appellant's injury was unforeseeable. To the contrary, it is confirmation of foreseeability and the consequences of dereliction of duty.

In some ways, this case is analogous to *McDonald v. Safeway Stores, Inc.*, 109 Idaho 305, 308, 707 P.2d 416, 419 (1985) in which this Court affirmed the denial of summary judgment allowing a plaintiff to proceed on a theory of negligent creation of a foreseeable risk of harm, which does not require that the retailer to have actual or constructive knowledge of a dangerous condition unless the moving party establishes that the condition (not the injury) is an isolated occurrence.
***6** In *Tommerup*, we distinguished the "isolated incident" situation from circumstances where an alleged tortfeasor is charged with having actively created foreseeable risk of danger in its course of business, stating:

Appellants cite *Jasko v. F. W. Woolworth Co.*, 177 Colo. 418, 494 P.2d 839 (1972) in support of this argument. That case, however, is readily distinguished on its facts. In *Jasko*, the plaintiff was injured in the defendant's store when she slipped on a slice of pizza which was on the terrazzo floor. An associate manager of the store testified that 500-1000 individuals per day purchased one or more slices of pizza at the pizza counter. There were no chairs or tables by the counter. Many customers stood in the aisle and ate the pizza from the wax paper sheets upon which they were served. When pizza was being consumed, porters "constantly" swept up debris from the floor.

In reversing an order granting defendant's motion for summary judgment, the Colorado Supreme Court held defendant's method of selling pizza was one which led inescapably to such mishaps as that of the plaintiff, and in such situation conventional notice requirements (i.e. actual or construction knowledge the *specific* condition) need not be met. The court there stated:

"The practice of extensive selling of slices of pizza on wax paper to customers [to] consume it while standing creates the reasonable probability that food would drop to the floor. Food on a terrazzo floor will create a dangerous condition. In such a situation, notice to the proprietor of the specific item on the floor need not be shown..."

The court further stated:
"The mere presence of a slick or slippery spot on a floor does not in and of itself establish negligence, for this condition may arise temporarily in any place of business. [Citation omitted.] Nor does proof of a slippery floor, without more, give rise to an inference that the proprietor had knowledge of the condition. [Citation omitted.] *But we are not dealing with an isolated incident."' Jasko v. F.W. Woolworth Co.*, 494 P.2d at 840.

The facts of the instant case more closely approximate those of *Jasko*, than those of *Tommerup*. Certainly, the trial court could not have concluded as a matter of law that the presence of the ice cream on the floor was merely an isolated incident. Hence, it did not err in denying Safeway's motion for summary judgment.

McDonald v. Safeway Stores, Inc., 109 Idaho 305, 308, 707 P.2d 416, 419 (1985).

Here, there is no argument that no other unruly dogs had been permitted in the store, or that they had not previously been removed when it became apparent to Respondent's employees ***7** that they were out of control:
Q I want to talk to you a minute or two about your rules for your employees in the Stinker store regarding dogs. Did you have rules that you had put in place -

A Yes.

Q -- to your employees regarding allowing dogs in the store prior to August 6th, 2011?

A Yes. From the beginning that I've been at that store, the dogs had to be on a leash and they could not be unruly dogs. They had to be dogs that were controllable. We did have some customers that I really made mad because I would not allow them to bring their dogs into the store because they did not look controllable to me.

Wilson Depo. Pg. 32 Ln. 15 to Pg. 33 Ln. 3, Cr. 000146.

THE ISSUE OF MORAL BLAME IS IRRELEVANT IN AN ORDINARY NEGLIGENCE CASE

The issue of moral blame is a curious one if it is to be applied in an ordinary negligence case, because generally speaking, it is reasonable to assume that either no moral blame attaches to common law negligence, or it attaches to all acts and ommissions which are simply negligent, and not reckless. Assuming that an injury caused by an item falling from a shelf or a slip on a slippery floor is caused by ordinary negligence, ther is no moral blame unless one considers all acts of carelessness to be immoral. If anyone holds such a view, it is unlikely that members of this Court share it. Appellant submits that the balancing process employed by the Court is unnecessary with respect to simple acts of active negligence on the part of a business serving the public, and, therefore, the issue of moral blame is unecessary to the analysis in this case. The general duty of a business owner to refrain from active neglignce is well settled. Every person, in the conduct of his business, has a duty to exercise ordinary care to "prevent unreasonable, foreseeable risks of harm to others." *Sharp v. W.H. Moore Inc.*, 118 Idaho 297, 300, 796 P.2d 506, 509 (1990); *Turpen v. Granieri*, 133 Idaho 244, 247, 985 P.2d 669, 672 (1999). Surely, it cannot be the intent of this Court that every fact situation involving active negligence on the part ***8** of a business presents a new issue of law that must be analyzed under Turpin as a matter of law, or that the application ogf the general concept of active negligence to unique facts constittues an "extension of the law" requiring a Court to apply the *Turpin* analysis. Such a holding would literally require this Court to entertain appeals in every factual scenario presented in the various cases that come before Idaho's trial courts, for the reason that each new factual scenario requires an extension of the law. For this reason, this Court has stated "We only engage in a balancing of the harm in those rare situations when we are called upon to extend a duty beyond the scope previously imposed, or when a duty has not previously been recognized." *Rife v. Long*, 127 Idaho 841, 846, 908 P.2d 143, 148 (1995). It is sufficient for trial courts to recognize the general duty to use due care under the circumstances in cases involving ordinary negligence in a business context.

Respondent argues that the dog in question had been in the store before on many occasions and had never caused a problem. "She had been in the store before, she had been a busy playful dog and yet she had never jumped up on anyone before. Thus, Stinker Stores had no reason to ask Defendant Fuller to remove her from the store this time. It simply was not foreseeable that she would jump on the Plaintiff and cause injury." This conclusion is based on statements made without sufficient foundation, as it is a generalization made by Respondent's manager apparently based on hearsay, unless she witnessed every such occasion.

Furthermore, even this self-serving statement does not state that the dog never jumped up on anyone on a previous occasion, but simply that it had never done so and caused injury. It is easily conceivable that a friendly but unruly dog might jump up on people all of the time, and only cause injury when it did so to a frail, **elderly** gentlemen. Appellant disagrees that this fact has any significance whatsoever if it is advanced simply for the proposition that the absence of prior injury necessarily compels the conclusion that the dog never jumped up on anyone, and never presented a ***9** danger. Nevertheless, the statement raises a significant favorable inference - the benefit of which has thus far been denied to the Appellant.

Animals, like humans, tend to be creatures of habit. It is probable that the dog behaved on prior occasions similarly to the way it did on the occasion on which Appellant was injured. It appears from the surveillance videos that the dog'S owner, at least on this occasion, did not bother to hold his leash, and that he was not sufficiently trained to refrain from jumping up on the counter. In the absence of evidence of the contrary, there is no reason to believe that the dog behaved "better" on prior occasions. In the final analysis, how the dog and its owner behaved on prior occasions is not dispositive.

Table 1

EVIDENCE OF DOG'S BEHAVIOUR ON PRIOR VISITS TO THE STINKER STORE

OBSERVATIONS ON PRIOR OCCASSIONS	Dog held on leach	Dog not held on leas
Dog jumping on counter	Scenario #1: Notice that dog is unruly and not kept under control	Scenario #2: Notice that dog is unruly and not kept under control
Dog not jumping on counter	Scenario #3: No inference can be drawn that dog will not become unruly when leash not held	Scenario #4: Reasonable inference that dog will not become unruly when not under control of leash

Only in Scenario #4 is it reasonable to assume that the dog will not become unruly when his leash is not held. But we need not speculate as to the nature of the prior conduct of the dog in question, because Respondent's Brief supplies us with the necessary information:

> On the date of the incident, Darma was acting in the typical way she usually did, and that behavior had not been cause to remove her or implicate the policies of the store manager on prior occasions. *Wilson Depo.* at 40, 11. 17-21, CR 147. *Respondent's Brief* at 14.

Ms. Wilson testified:
Q Okay, and at least in looking at the video, what I saw was the dog sort of jump up on the counter and put his front paws up on the counter. Did you see that in the video?

***10** A Oh, yeah, he was an excited little dog -- yeah, big dog.

Q When you saw that in the video, was that a surprise to you?

A No.

Q That was typical of his behavior?

A Yes.

Q So you knew he was a dog that jumped up?

A Yes.

Wilson Depo. Pg. 40 Ln. 11-23, CR 000146.

In other words, Respondent admits that it had foreknowledge that it was typical for the dog to jump up on the counter and on people prior to the occasion in question, but it denies that the dog had previously caused injury. This is akin to an argument in a dram shop case that a patron had previously appeared to be intoxicated, but had never been known to cause an accident.

Even assuming that competent evidence demonstrated Scenario #4 had characterized the vast majority of the dog's prior visits to the store, once the dog demonstrated his unruliness by jumping repeatedly on the counter - as demonstrated in the videos-

it would at least arguably be unreasonable to rely on the dog's prior behavior as an excuse for not requiring the dog's owner to grab the leash and get the dog under control. In sum, the record does not demonstrate the dog's prior visits to the store can be characterized as falling within Scenario #4, and even if it did, this would not entitle Respondent's employee to ignore a clear change in the dog's customary behavior. Respondent's argument on this point simply has no logical force, and, respectfully, the District Court's finding that the injury was unforeseeable is similarly flawed.

Respondent argues that the Court's finding of no duty was also supported by the District Court's finding "that the injury was not severe and was not close in connection between the conduct because Mr. Braese did not appear injured and walked around the same before and after he was bumped into the rack, and (3) this was not a case where there was a foreseeability of great harm. (CR ***11** 216)." This argument's force is blunted by the fact that there was clearly evidence of injury contained in the record irrespective of the sanguinity of the District Court's view of the effect of the dog jumping upon on Appellant derived from her view of the videos, and the fact that the District Court's assessment of foreseeability invades the province of the jury.

One can assume that at least **elderly** jurors, who presumably exercise typical caution against falls commensurate with their age, would not regard a large dog jumping up on them as free of risk. It is common knowledge that in the **elderly**, particularly those with the osteoporosis that generally attends aging, a fall can cause a hip fracture, which can often result in decline leading to death. There is simply nothing in the record from which the District Court could have concluded as a matter of law that 1) the store did not serve **elderly** patrons, or 2) that a dog jumping up on **elderly** patrons could not cause them injury. At a minimum, a jury could reasonably conclude that the cashier should have told the dog's owner to pick up the leash and hold him when an **elderly** man entered the store, and that he should have desisted in exciting the dog by feeding it treats from behind the counter.

CONCLUSION

This is a case that never should have been dismissed on summary judgment. Respondent had a duty of ordinary care as a matter of law. There is no genuine issue of material fact as to foreseeability in general, because it is undisputed that Respondent voluntarily took action to guard against injury to patrons from unruly dogs. There is a genuine issue of material fact as to whether or not injury was foreseeable once the cashier saw the dog in question jumping up and unestrained by a leash. There is a genuine issue of material fact as to or not the cashier acted reasonably in not telling the dog owner to either get the dog under control or remove it from the store in keeping with what the manager has testified was her practice. Summary ***12** judgment should be affirmed with instructions to the District Court to permit Plaintiff to introduce evidence for a limited purpose of the Idaho Food Code's prohibition against having a dog in the store, assuming a proper foundation, because it is relevant to the Defendant's claim that it would be unreasonable and overly burdensome to have to take action to prevent its patrons from having to encounter unruly and potentially dangerous animals within its stores.

Appendix not available.

Footnotes

1 Because the District Court implicitly held that violation of the Idaho Food Code was irrelevant, Appellant hopes that this Court will address the significance of an ordinance which, while admittedly insufficient to warrant an instruction on negligence *per se*, is nevertheless relevant to rebutting a defense based on the argument that taking measures to prevent injury would be "unreasonable and burdensome." The relevant provisions of the Idaho Food Code are:

2 *Id., Wilson Depo.* Pg: 38 Ln: 10 - 18. CR 146.

3 Id., Wilson Depo. Pg: 37 Ln: 9 - Pg: 38 Ln: 3. CR 146.

4 *Wilson Depo.* Pg: 32 Ln: 15 to Pg: 33 Ln: 16. Emphasis supplied.

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